Supreme Court, U.S.
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No. 01-773

In The

Supreme Court of the United States

JOHN N. BACH, J. D. RITCHIE and ELAINE RITCHIE,

Petitioners,

v.

UNITED STATES OF AMERICA, INTERNAL REVENUE SERVICE, JAMES MASON, CINDY MASON, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioners set out seven issues that they contend are presented for review in their petition. However, the only issue decided by the Ninth Circuit was that the district court did not abuse its discretion in dismissing the amended complaint with prejudice for the Petitioners' failure to comply with the pleading requirements of Fed. R. Civ. P. 8. (Petitioners' Appendix ("App.") 1-4) Thus, there is only one issue that is properly presented to this Court for review: "Did the Ninth Circuit Court of Appeals correctly determine that the district court did not abuse its discretion in dismissing with prejudice the Petitioners' amended complaint for failure to comply with the pleading requirements of Fed. R. Civ. P. 8?"

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Bonneville County, Byron Stommel, Kay Cortez, Gina Dixon, Charlotte Munns, Paul Wild, Glen Huderman, Ron Longmore, Blake Mueller, Jefferson County, Connie Keller, Blair Olsen, Stephen Clark, Madison County, Beth Reese, Lyle Saurey, Greg Moffat, Terry Bair, Sid Brown, Kipp Manwaring, David Sasser and Hamlin & Sasser (hereinafter "the County Respondents") submit the following brief in opposition to the petition for certiorari filed by Petitioners John N. Bach, J. D. Ritchie and Elaine Ritchie.

STATEMENT OF JURISDICTION

Petitioners have failed to identify any provision conferring jurisdiction on this Court for review on a writ of certiorari. However, it is not in dispute that this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) for review on a writ of certiorari of the decision of the Ninth Circuit.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND REGULATIONS

The only issue in this case is the proper application of Fed. R. Civ. P. 8(a) and 8(e) which read as follows:

> (a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counter-claim, cross-claim, or third-party claim, shall contain . . . , (2) a short and plain

statement of the claim showing that the pleader is entitled to relief . . .

. . .

(e) Pleading to be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

. . .

STATEMENT OF THE CASE

This case was initiated with the filing of an incomprehensible and verbose complaint on September 30, 1998. This complaint, brought by Petitioners and 13 other plaintiffs, was 54 pages long plus 19 pages of exhibits. It named 97 separate individual defendants, including five counties in the state of Idaho, and 23 separate county officials and/or employees.

Petitioners attempted service on the County Respondents more than 120 days subsequent to the filing of the complaint. The County Respondents thereafter filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(5) for insufficiency of service of process, and/or Fed. R. Civ. P. 4(m) for failure to serve the complaint within 120 days of its filing.

On June 1, 1999, the district court entered an order *sua sponte* dismissing the complaint with leave to amend. (App. 23-27) The district court noted that the complaint, when broadly construed, appeared to allege a conspiracy

between the Defendants to deprive the Plaintiffs of various constitutional rights and found that the complaint was "verbose, convoluted, and extremely difficult to comprehend" and that allegations were "irrelevant or stated in a conclusory fashion." (App. 24) The court held that the complaint's major flaw was "its lack of specificity. No attempt is made to match up the specific factual allegations and the specific legal claims to specific defendants. In other words, the complaint does not state which defendants are liable on which of the claims." (App. 24)

The district court's order also gave Petitioners specific direction to assist them in complying with Fed. R. Civ. P. 8. This advice included (1) that Petitioners identify which causes of action are brought against which specific Defendants, (2) that Petitioners separate the claims so that only one claim was pleaded under each heading or cause of action, (3) that Petitioners plead facts that are relevant to the various claims, and (4) that Petitioners review apparently meritorious motions to dismiss brought by some of the Defendants, and to appropriately adjust arguments and allegations in the amended complaint. (App. 25-26)

The district court ordered that Petitioners file an amended complaint within 30 days of the order and also "admonished that failure to amend so as to comply with Rule 8 may also result in dismissal with prejudice." (App. 27)

After receiving an extension from the court, Petitioners filed an amended complaint on August 2, 1999, which was not significantly changed from the original complaint. The County Respondents once again filed a

motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(5) and 4(m). Other defendants filed motions to dismiss asserting that the amended complaint still failed to comply with Fed. R. Civ. P. 8. On October 21, 1999, the district court entered an order of dismissal with prejudice as to all defendants. (App. 5-22)

The district court held that "[a]lthough plaintiffs in the instant action have made cosmetic changes to their complaint, it still does not comply with either Rule 8 or this court's previous order." (App. 8) The court also noted that although Petitioners were *pro se*, the lead plaintiff, John Bach, was a former attorney and "presumably capable of drafting a comprehensible and legally sufficient complaint setting forth plaintiffs' claims." (App. 10) Because all of the defendants were in the same position with regard to the sufficiency of the pleading, the district court dismissed the amended complaint as to all defendants. (App. 10)

The district court also noted that the County Respondents' Rule 4(m) motion to dismiss appeared to be meritorious, but declined to dismiss the amended complaint without prejudice on that basis, because of the dismissal with prejudice pursuant to Fed. R. Civ. P. 8. (App. 10-11)

Petitioners timely filed a notice of appeal, and after briefing, the Ninth Circuit, in an unpublished memorandum decision, held that the district court did not abuse its discretion in dismissing the case with prejudice for violation of Fed. R. Civ. P. 8. (App. 4) This is the only issue addressed by the Ninth Circuit, and is the only issue properly before this Court for review.

ARGUMENT

A. Standard Of Review.

In the Petition's section entitled "Jurisdiction," Petitioners reference Supreme Court Rules 10(a) and (c) as providing jurisdiction to this Court for consideration of the petition. This rule, however, does not deal with jurisdiction, but rather states that a petition for writ of certiorari "will be granted only for compelling reasons" and that the Court will consider (1) whether a decision of a court of appeals conflicts with a decision of another court of appeals on an important matter, (2) whether a court of appeals has decided an important federal question that conflicts with a decision of a state court of last resort, or (3) whether a court of appeals has so far departed from an accepted course of decision of judicial proceedings, or sanctioned such departure by a lower court as to justify the "exercise of this Court's supervisory power."

Based on these factors, Petitioners have not shown this Court any compelling reason to review the decision of the Ninth Circuit. Petitioners make no contention that the Ninth Circuit's decision conflicts with a decision of another United States court of appeals, or that it has decided an important federal question in conflict with the decision by a state court of last resort. At best, Petitioners attempt to show that the Ninth Circuit has departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by the district court. No such showing has been adequately or convincingly made by Petitioners herein.

B. District Court's Power to Dismiss *Sua Sponte*.

Petitioners vaguely argue that the district court was beyond its power to enter the initial order of dismissal with leave to amend because it was done *sua sponte*. Petitioners contend that they have "found no statutory law, no rules nor even case law, that give a district court such jurisdiction, discretion, to issue such orders as presented for review herein." (Petition 9) However, case law does exist in support of such a *sua sponte* ruling by a district court.

In *Simmons v. Abruzzo*, 49 F.3d 83 (2nd Cir. 1995), the district court dismissed a *pro se* complaint *sua sponte* for failure to comply with Fed. R. Civ. P. 8. The Second Circuit Court of Appeals ultimately determined that the district court had abused its discretion in dismissing the complaint, but held that "[w]hen a complaint fails to comply with these requirements [of Rule 8], the district court has the power, on motion or *sua sponte*, to dismiss the complaint or to strike such parts as are redundant or immaterial." *Id.* at 86. Thus, the Ninth Circuit was not incorrect or outside the bounds of reasonable judicial action in entering its memorandum decision affirming the dismissal with prejudice, and the district court was within the proper exercise of its powers to enter the initial order of dismissal without prejudice *sua sponte*.

C. Standards for Fed. R. Civ. P. 8 Pleading/Dismissal With Prejudice.

Petitioners contend that the district court abused its discretion in dismissing the amended complaint with prejudice, but fail to show how that dismissal was an

abuse of discretion. In fact Petitioners do not even attach copies of the complaint or amended complaint to their petition. Certainly, if Petitioners desire to persuade this Court to accept their petition for review, they need to demonstrate to this Court the validity of their pleadings by attaching those pleadings in the appendix.

This Court addressed the standards for pleadings under Fed. R. Civ. P. 8 in *Conley v. Gibson*, 355 U.S. 41 (1957). In reference to Rule 8(a)(2), this Court noted that "all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Id.* at 47.

Notwithstanding the district court's advice to Petitioners on Fed. R. Civ. P. 8 pleading requirements, the amended complaint made only cosmetic changes, and ignored the district court's pleading suggestions. (App. 8-9) Petitioners apparently believe that the length of the complaint was the only concern addressed by the district court. They emphasize in their petition that the amended complaint was reduced in size, without any additional exhibits but do not discuss how the amended complaint addressed the other pleading suggestions of the district court. Length of the complaint, however, was not the principle concern of the district court. Rather, the district court was concerned that the complaint was "verbose, convoluted and extremely difficult to comprehend. In addition, many of the allegations are irrelevant or stated in a conclusory fashion." (App. 24) These concerns were never adequately corrected by Petitioners.

In reviewing whether a district court abused its discretion in dismissing a complaint for violation of Fed. R. Civ. P. 8, courts of appeal often look to whether the plaintiffs had been fairly warned that failure to comply would lead to a dismissal with prejudice. *Bautista v. Los Angeles Co.*, 216 F.3d 837, 841 (9th Cir. 2000). In *McHenry v. Renne*, 84 F.3d 1172 (9th Cir. 1996), the Ninth Circuit affirmed a ruling of a district court dismissing a complaint with prejudice after allowing the plaintiffs various opportunities to amend the complaint, and after having the magistrate judge review the complaint to assess the viability of the claims stated therein. The Ninth Circuit held that because dismissal with prejudice is a harsh remedy, a district court should look to see whether less drastic alternatives are available. *Id.* at 1178. The court emphasized, however, that the district court " 'need not exhaust [all less drastic alternatives] before finally dismissing a case.' " *Id.*, citing *Von Poppenheim v. Portland Boxing & Wrestling Commission*, 442 F.2d 1047, 1054 (9th Cir. 1971).

In *Nevijel v. North Coast Life Insurance Co.*, 651 F.2d 671 (9th Cir. 1981), the district court ordered that the plaintiffs file an amended complaint to comply with Fed. R. Civ. P. 8. Several defendants then moved to dismiss the amended complaint alleging that it did not comply with the rule. The district court granted the motions and dismissed the amended complaint with prejudice. The Ninth Circuit found that the district court had not abused its discretion. It held:

> We hold that no abuse of discretion occurred here. Though there are a wide variety of sanctions short of dismissal available, the

> district court need not exhaust them all before finally dismissing a case. The exercise of his discretion to dismiss requires only that possible and meaningful alternatives be reasonably explored, bearing in mind the drastic foreclosure of rights that dismissal effects.
>
> Here, the district court made such reasonable opportunities and alternatives available to appellant that dismissal was not an abuse of discretion. The original complaint, filed in November 1976, was verbose, confusing and almost entirely conclusory. . . . The second complaint . . . was equally as verbose, confusing and conclusory as the initial complaint. The court did not dismiss with prejudice until after appellants had submitted briefs supporting a motion to alter the judgment and a motion for permission to file a second amended complaint.

Id. at 674.

In *Bautista v. Los Angeles Co., supra,* the Ninth Circuit overturned a decision of a district court dismissing with prejudice a complaint for failure to comply with Fed. R. Civ. P. 8. The court held that the district court had not considered less drastic alternatives to dismissal, and that the district court's previous order granting the plaintiffs leave to amend "issued a bare-bones order with only a cursory direction to 'plead specific facts that would create an individual prima facie claim of age, race, or disability discrimination.' The court made no reference to Rule 8(a) or Rule 10(b), it did not specify what it required in the pleading, and it gave no warning that it would dismiss the next complaint with prejudice if it did not comply." *Id.* at 841.

In the case at bar, the district court's order of June 1, 1999, fulfilled all of the concerns set out above for a district court to explore less drastic measures than a dismissal with prejudice of the complaint. The court gave Petitioners explicit instructions on ways in which they should amend their complaint to comply with Fed. R. Civ. P. 8, and informed them that failure to comply would result in a dismissal with prejudice of their action. Rather than follow the suggestions of the district court, Petitioners filed an amended complaint that ignored those suggestions. On this basis, the Ninth Circuit reviewed the district court's order for abuse of discretion, and determined that there was no abuse of that discretion to justify overturning the dismissal.

CONCLUSION

Petitioners have failed to show this Court that there are compelling reasons for accepting the petition for writ of certiorari. The Ninth Circuit was correct in its determination that the district court did not abuse its discretion in dismissing with prejudice Petitioners' complaint. Such action by the district court did not depart so far from the accepted and usual course of judicial proceedings as to call for the exercise of jurisdiction in this Court. Rather, the district court was within its discretion to dismiss the amended complaint with prejudice because of

Petitioners' failure to follow its suggestions to bring their pleadings in compliance with Fed. R. Civ. P. 8.

DATED this 28th day of December, 2001.

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